No. 13444

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PAPPAS AND COMPANY AND FRESH FRUIT AND VEGETABLE WORKERS UNION, LOCAL 78, AND FOOD, TOBACCO, AGRICULTURAL AND ALLIED WORKERS UNION OF AMERICA, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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Miscellaneous—Continued

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For the first time in these proceedings respondent Company urges in its brief before this Court that its employees are agricultural laborers and hence not entitled to the protection of the Act. The contention is predicated on the exclusionary language of Section 2 (3) of the Act and on the limitations attached to the Board's appropriation bill in effect during the processing of this case. The opportunity to raise this issue before the Board was available at each step of the proceedings, but the Company made no effort to utilize it. Thus, the Company filed no answer to the Board's complaint which clearly alleged that the em-

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ployees involved were protected by the Act (R. 9–13); it declined to produce evidence or examine witnesses in order to adduce facts pertaining to the contentions it now makes; it refused the trial examiner's invitation at the close of the hearing to "make a statement for the company" (Tr. 128);[1] and it failed to file exceptions to the trial examiner's intermediate report, in which the Company's employees were determined to be within the Act's protection (R. 42, 51, 52). Accordingly, the Board has had no occasion to pass on the merit of respondent's contention.[2]

In these circumstances, the question the Company belatedly attempts to raise falls squarely within the

[1] This refusal occurred at the close of the hearing in the following colloquy between the trial examiner and representatives of the parties (Tr. 127–128):

Trial Examiner SPENCER. Do you care to argue the merits of the case?

Mr. MAGOR (counsel for the Board). I think the merits are more or less presented before the Trial Examiner in the record sufficiently.

Trial Examiner SPENCER. How about you, Mr. Gillie?

Mr. GILLIE (counsel for the charging party). Satisfied.

Trial Examiner SPENCER. Mr. Burke?

Mr. BURKE (counsel for the Union). We are also.

Trial Examiner SPENCER. Do you wish to make a statement for the Company?

Mr. WARKENTINE (representative of the Company). No.

Occasional references in this brief to testimony not reprinted in the record are documented, as here, by setting forth the relevant passages in a footnote. These passages were not designated to be printed in the record because, as stated in the text above, the Company did not indicate at any time while this case was before the Board that it intended to raise the question to which such testimony is relevant.

[2] Like the Company, the Union also did not raise the question before the Board of whether the employees here involved were agricultural workers.

restrictive language of Section 10 (e) of the Act which provides that "No objection that has not been urged before the Board, its member agent, or agency, shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." At no time has the Company attempted to excuse its dereliction "because of extraordinary circumstances," but apparently seeks in its brief to avoid the impact of Section 10 (e) by labeling its contention "jurisdictional" (Br., p. 5). As we shall demonstrate, however, a showing that the employees involved in unfair labor practice cases are not agricultural workers has not been made a jurisdictional prerequisite either by Section 2 (3) of the Act or by the appropriation rider in effect during the proceedings in this case, which further limited the Board's processes with respect to agricultural workers. Accordingly, the Company cannot escape the interdiction of Section 10 (e) against making belated contentions. Cf. *United States* v. *Tucker Truck Lines,* 344 U. S. 33. And we shall further show that in any event, the Company's employees are not agricultural workers within the meaning of the exemption relied on by the Company.

I. The Company's contention that its employees are exempt from the Act's protection does not raise a jurisdictional issue, and therefore cannot be urged initially before this Court

A. A showing that employees involved in Board proceedings fall within the definition given in Section 2 (3) of the Act is not a jurisdictional requirement

The general term "employees," as it is used in the provisions of the Act which guarantee such employees

organizational rights (Section 7), protect them from unfair labor practices (Section 8 (a)), and establish procedures for their selection of a bargaining representative (Section 9), is defined in Section 2 (3). That Section, in applicable part, reads:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act * * *

The Company makes the unsupported claim that the several exemptions listed in this section are jurisdictional in character. This contention confuses the term jurisdiction, which applies to the fundamental adjudicatory "power to hear and determine the controversy" (In re *N. L. R. B.,* 304 U. S. 486, 494), with considerations which govern the merits of a case, that is, statutory provisions and common law principles by which tribunals determine whether a cause of action has been established. Contrary to the Company's assumption, it does not follow from the fact that the

Act imposes a duty upon the Board not to find unfair labor practices where the employees involved do not come within the definition of Section 2 (3), that this duty affects the Board's jurisdiction. For "jurisdiction is the power to decide the case either way * * *." *Erickson* v. *United States,* 264 U. S. 246, 249. And legislative directions to courts or administrative agencies, even where couched in mandatory language, do not necessarily go to the jurisdiction of the tribunal involved.[3] Accordingly, the test of a jurisdictional requirement is not whether a wrongful decision would be violative of a duty imposed on the tribunal by the legislature or a departure from legislative intent; rather the distinction between jurisdiction and substantive or procedural rights of a litigant is a question "of construction and common sense." *Fauntleroy* v. *Lum,* 210 U. S. 230, 235.

We think that common sense makes it apparent that the several exemptions contained in Section 2 (3) of the Act are not of the calibre that pertains to the Board's power, as distinct from its duty. An examination of the provisions of Section 2 (3) shows that in addition to the exemption pertaining to agricultural employees, the statute exempts any employee working for his parent or spouse, domestic servants, persons whose jobs were terminated because of labor disputes but who have not obtained equivalent employment, and supervisory employees. These considerations are not concerned with fundamental

[3] *Humphrey* v. *Smith*, 336 U. S. 695; *Smith* v. *Apple*, 264 U. S. 274; *Fauntleroy* v. *Lum*, 210 U. S. 230, 234–235; *N. L. R. B.* v. *Greensboro Coca Cola*, 180 F. 2d 840, 844–845 (C. A. 4).

adjudicatory power, but rather with whether a particular claimant qualifies to obtain the benefits of the Act. Were the Company's contention to the contrary to prevail, the Board in every unfair labor practice case would be obliged to show, in order to establish its jurisdiction,[4] that the employees involved are not related to the employer, that if their employment had been terminated because of a labor dispute they had not since obtained equivalent employment, that they are not in the domestic service of a family, that they are not independent contractors, and so on, just as the Board now is obliged to show that the employer's business affects interstate commerce (see R. 10–11, 83). Similarly, because of the liberality of the rules which permit advantage to be taken of a jurisdictional defect, issues concerning these same matters could be raised, as the Company now seeks to raise the issue of agricultural exemption, at any time during a case,[5] at the initial hearing or on appeal by either party or by the court *sua sponte,*[6] without the benefit of prior decision by the Board after litigation before it. These consequences emphasize what seems apparent on the face of the Section 2 (3) definitions—that they are non-jurisdictional. Otherwise, as Mr. Justice Holmes put it, "* * * common sense would revolt." *Fauntleroy* v. *Lum, supra,* p. 235.

[4] Cf. *Clark* v. *Paul Grey, Inc.*, 306 U. S. 583, 589–590; *N. L. R. B.* v. *Greensboro Coca Cola*, 180 F. 2d 840, 845 (C. A. 4).

[5] *City of Gainsville* v. *Brown-Crummer Co.*, 277 U. S. 54; *Central States Co-op.* v. *Watson Bros.*, 165 F. 2d 392 (C. A. 7).

[6] *Laughlin* v. *Cummings*, 105 F. 2d 71 (C. A. D. C.).

It follows from what we have said that the Boar had jurisdiction over the subject matter of this cas regardless of whether the Company's employees wer agricultural laborers within the meaning of Sectio 2 (3) of the Act. Accordingly, the agricultural ex emption question briefed by the Company is no before the Court, for the Company cannot escape "th salutary policy adopted by Section 10 (e) of affordin the Board opportunity to consider on the merits ques tions to be urged upon review of its order." *Ma shall Field & Co.* v. *N. L. R. B.*, 318 U. S. 253, 25 See also, *N. L. R. B.* v. *Seven-Up Bottling Co.*, de cided by Supreme Court on January 12, 1953, 3 LRRM 2237, 2239–2240; *N. L. R. B.* v. *Cheney Cal fornia Lumber Co.*, 327 U. S. 385, 388–389; *Unite States* v. *Tucker Truck Lines*, 344 U. S. 33.

B. The definition of agricultural employees contained in the appropriati bill rider in effect during the proceedings in this case does not limit t Board's jurisdiction

In addition to the Company's contention that th agricultural exemption in Section 2 (3) of the Ac restricts the Board's jurisdiction, and that it ma therefore initially raise the question before this Cour of that Section's application in this case, the Com pany also makes the same contention, and claims th same privilege for the belated question it raises, wit respect to the different limitation relating to agri cultural employees contained in a rider to the appro priation bill authorizing funds for the Board's opera tions during the period when the proceeding in thi case occurred. The language of the agricultural ride upon which the Company relies was first enacted i

the Board's appropriation bill for the fiscal year of 1946–1947, and has been reenacted in every subsequent appropriation bill to date. It reads (Public Law 759, 81st Cong. 68):

> *Provided,* that no part of this appropriation shall be available to organize or assist in organizing agricultural laborers or used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers as referred to in section 2 (3) of the Act of July 5, 1935 (49 Stat. 450), and as amended by the Labor-Management Relations Act, 1947, and as defined in section 3 (f) of the Act of June 25, 1938 (52 Stat. 1060).

During the years that this appropriation rider has been in effect there has been no modification of the language in Section 2 (3) of the Act which deals with the agricultural exemption, with the result that neither agricultural workers within Section 2 (3) or within "section 3 (f) of the Act of June 25, 1938" (the Fair Labor Standards Act) are entitled to the benefits of the Act. And as the Company concedes (Br., pp. 7, 11), there is a difference between the two exempting provisions. The exemption contained in Section 3 (f) of the Fair Labor Standards Act was intended to "broaden the agricultural exclusion" (Resp. Br., p. 7) over that contained in Section 2 (3) of the National Labor Relations Act.

But just as the Company cannot initially raise in this Court a question concerning the agricultural exemption in Section 2 (3), because that question is not jurisdictional in dimension, neither can it raise

a similar question under the exemption in the agricultural rider. For it has been conclusively determined by this and other courts that such an appropriation rider does not affect the Board's jurisdiction. *N. L. R. B.* v. *Thompson Products,* 141 F. 2d 794, 798–799 (C. A. 9). See also, *Camp & Co.* v. *N. L. R. B.,* 160 F. 2d 519, 521 (C. A. 6); *N. L. R. B.* v. *Elvine Knitting Mills,* 138 F. 2d 633, 634 (C. A. 2); *N. L. R. B.* v. *Baltimore Transit Co.,* 140 F. 2d 51, 58 (C. A. 4).

It is of particular importance in this case that appropriation riders, like that involved here, which do no more than restrict the manner in which an agency may disburse its funds, have been established by the settled authority as nonjurisdictional. For even if the Court should hold, contrary to our contention made on pp. 3-7, *supra,* that the definitions in Section 2 (3) are jurisdictional, it would not follow, in view of the nature of an appropriation rider as described in the foregoing cases, that the Company could raise the question of whether the broader exemption in the appropriation rider is also applicable in this case. And we believe that the separate question of whether the Section 2 (3) exemption applies to the employees in this case, assuming that it has been properly raised, has been conclusively settled against the Company by this Court in the three cases which it has had occasion to consider the language in Section 2 (3) dealing with agricultural workers. See *North Whittier Heights Citrus Association* v. *N. L. R. B.,* 109 F. 2d 76, certiorari denied

310 U. S. 632; *N. L. R. B.* v. *Tovrea Packing Co.*, 111 F. 2d 626, certiorari denied, 311 U S. 668; *Idaho Potato Growers* v. *N. L. R. B.*, 144 F. 2d 295, certiorari denied, 323 U. S. 769.[7] These cases, like the instant one, concerned employees engaged in activities related to the sorting and packing of agricultural commodities after they had been brought into a packing shed from the fields. As the Court observed in the *Potato Growers* case, "employees who are not working at farming, but who are specializing in the preparation of farm products for trade or shipment after they have been raked or gathered, are not agricultural laborers [within the meaning of Section 2 (3) of the Act]" 144 F. 2d at 301.

The Company's attempt to distinguish these cases is wholly unavailing. Thus, the *North Whittier Heights* case can scarcely be differentiated from this case because in that case, as the Company points out (Br. p. 13), "When [the commodity] reaches the packing house, it is then in the practical control of a great selling organization." For the Company's selling organization was also necessarily substantial, in order to dispose of what it refers to as its "$400,000 melon crop" (Br. p. 6). And the fact that the employees in the *Tovrea* case were employed in activities

[7] These cases were decided before the 1946 appropriation rider was enacted, and consequently are not concerned with the question of the applicability of Section 3 (f) of the Fair Labor Standards Act, which broadens the agricultural exemption. They treat only the narrower exemption contained in Section 2 (3) of the National Labor Relations Act, which, as the Company properly concedes (Br., p. 10), has not been changed by the 1947 amendments.

"adjacent to" and "incidental to" (Br. pp. 13, 14) the packing plant, far from distinguishing that case as the Company suggests, serves only to emphasize that had they been employed in the packing plant, as here, the inapplicability of the agricultural exemptions would be even clearer. Finally, the Company's assertion that the *Potato Growers* case differs from this one, because the employers involved packed potatoes grown by other persons, furnishes no distinction, for as the facts of that case make clear, several of the employers packed potatoes they grew themselves. See 144 F. 2d at p. 299.

Accordingly, while we strongly contend that Section 2 (3) of the Act is not jurisdictional, we think that irrespective of that contention, the Company is left without any argument that has not already been unambiguously resolved against it by the decisions of this Court. For this Court has held both (1) that packing shed employees like those involved here are not exempted from the Act's benefits by Section 2 (3), and (2) that an appropriation rider, like the one relied on by the Company, does not affect the Board's jurisdiction, with the consequence that the Company cannot raise the belated question of whether the employees in this case are covered by the agricultural exemption in the appropriation rider.

II. In any event, the Company's employees are not disqualified from enjoying the Act's benefits by the agricultural exemption contained in the rider to the Board's appropriation bill

We have shown that the question of the Company's employees' status as agricultural workers is not properly before the Court. We now show that even if

the Company were not precluded from advancing its contention, it is without merit and affords no defense to enforcement of the Board's order. In turning to this question, we deal only with the agricultural exemption contained in the rider to the Board's appropriation bill, and not with the different language of Section 2 (3) of the Act. For if the Company cannot bring its employees within the broader definition of agricultural laborers written into the appropriation rider, *a fortiori* it cannot bring them within the narrower definition in Section 2 (3) of the Act. Moreover, as we have shown, *supra,* pp. 9-11, the decisions of this Court conclusively establish that employees engaged in packing sheds, like the Company's, are not within the exemption of Section 2 (3) of the Act.

A. Administrative and judicial authority establishes that packing shed employees whose employment circumstances are like those of the Company's are not within the definition of agricultural laborers which is incorporated in the rider to the Board's appropriation bill

As we have stated elsewhere, the agricultural rider to the Board's appropriation bill disallows the expenditure of Board funds in connection with employees engaged in agriculture as that term is defined in Section 3 (f) of the Fair Labor Standards Act. Section 3 (f) in applicable part reads (29 U. S. C. 203 (f)):

> Agriculture includes farming in all its branches * * * and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market * * *.

To support its contention that its employees are engaged in activities covered by this definition, the Company asserts (Br. p. 19) that the "melon packing [involved in this case] is carried on as 'an incident to' . . . [and] 'in conjunction with' [its] farming operations" because the dictionary definition of those terms includes a "combination" or "concurren[ce]" of events, such as sorting and packing melons after they are brought in from the fields where they grew. To fortify its dictionary definition argument, the Company relies (Br. pp. 21–26) upon judicial decisions which deal with agricultural worker provisions of statutes other than the Fair Labor Standards Act. The error of the Company's approach has been thoroughly exposed by the Supreme Court where it has warned that in construing Section 3 (f) of the Fair Labor Standards Act, courts must "not 'make a fortress out of the dictionary,'" and must avoid a "perver[sion of] the process of interpretation by mechanically applying definitions in unintended contexts." *Farmers Reservoir & Irrigation Co.* v. *McComb,* 337 U. S. 755, 764; see also *N. L. R. B.* v. *Cowell-Portland Cement Co.,* 148 F. 2d 237, 241 (C. A. 9), certiorari denied 326 U. S. 735.[8] Indeed, in rejecting a mechanical application of out-of-con-

[8] The point of the Supreme Court's admonition is well-illustrated here, where the Company relies (Br. pp. 24–25) on cases arising under The Social Security Act. For, as we show, *infra,* pp. 23-27, Congress rejected the definitions of agricultural worker contained in that act as being inappropriate to the National Labor Relations Act for the express reason, *inter alia,* that it did not wish packing shed employees to be exempted from the benefits of the National Labor Relations Act.

text definitions, the Supreme Court in the *Farmers Reservoir* case fully described a more accurate index to the correct construction of the agricultural exemption in the Fair Labor Standards Act (337 U. S. at 761–762):

> The determination cannot be made in the abstract * * *. The fashioning of tools, the provision of fertilizer, the processing of the product, to mention only a few examples, are functions which, in some societies, are performed on the farm by farmers as part of their normal agricultural routine. Economic progress, however, is characterized by a progressive division of labor and separation of function * * *. In this way functions which are necessary to the total economic progress of supplying an agricultural product, become, in the process of economic development and specialization, separate and independent productive functions operated in conjunction with the agricultural function but no longer a part of it. Thus, the question as to whether a particular type of activity is agricultural is not determined by the necessity of the activity to agriculture nor by the physical similarity of the activity to that done by farmers in other situations. The question is whether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity. The farmhand who cares for the farmer's mules or prepares his fertilizer is engaged in agriculture. But the maintenance man in a power plant and the packer in a fertilizer factory are not employed in agriculture, even if their activity is neces-

sary to farmers and replaces work previous done by farmers.

The approach which has thus been described by t Supreme Court is further delineated by the rule th "any exemption from such humanitarian and remedi legislation [as the Fair Labor Standards Act] mu * * * be narrowly construed * * *. To exte an exemption to other than those plainly and unmi takably within its terms and spirit is to abuse the inte pretative process and to frustrate the announced w of the people." *Phillips Co.* v. *Walling,* 324 U. S. 4 493; see also, *McComb* v. *Hunt Foods,* 167 F. 2d 9 908 (C. A. 9).

It is not enough, then, to bring employees with the agricultural exemption, to show—and responde goes no further—that they are engaged in any oper tions carried on by a farmer "until he has harveste prepared for market and sold the agricultural pro ucts which he has grown" (Br. p. 6).[9] For activiti of a farmer are not within the agricultural exemptio even though performed prior to sale of his produ and even though they are essential to the marketi of it, if they are so organized as to be "separa

[9] Respondent's reliance upon this Court's opinion in *McCo* v. *Hunt Foods*, 167 F. 2d 905, certiorari denied 335 U. S. 8 which alludes to "The policy of protection to the growers 'perishable and seasonal fresh fruits'" (Br. 27), is totally m placed. That case dealt not with the agricultural exemption und Section 3 (f), as ~~this~~ this case, but with an entirely differe section (7 (c)) which makes special exceptions to the wage a hour provisions of the Fair Labor Standards Act for growers perishable fruits. Obviously, entirely different considerations a applicable to the two sections.

and distinct from agriculture." *Calaf* v. *Gonzales,* 127 F. 2d 934, 938 (C. A. 1); *Waialua Agriculture Co.* v. *Maneja,* 97 F. Supp. 198, 222 (Hawaii). Accordingly, activities of a farmer which are industrial in character, and are organized as an independent unit from strictly farming work are not "an incident to or in conjunction with such farming activities" as required by Section 3 (f) of the Fair Labor Standards Act. The reason for this differentiation, has been explained by the Court of Appeals for the First Circuit (*Bowie* v. *Gonzales,* 117 F. 2d 11, 18):

> The [Fair Labor Standards] Act was drawn not to include [farm workers] because agriculture labor was not subject to the usual evils of sweat shop conditions of long hours indoors at low wages. Also any attempt to regulate agricultural wages would present a difficult problem since a substantial part of the agricultural workers' income must of necessity be for board and room. The employees in the instant case are typical factory workers or laborers engaged in maintaining industrial facilities. The exemption of agricultural labor from the operation of the Act is not admissible as an argument to exempt labor in an industry from its operation.

As this Court has summarized the distinctions between agricultural operations and industrial activities respecting agricultural commodities, "when the product of the soil leaves the farmer, as such, and enters a factory for processing and marketing it has entered upon the status of industry." *North Whittier*

Heights Citrus Association v. *N. L. R. B.*, 109 F. 2
76, 80 (C. A. 9), certiorari denied, 305 U. S. 660.[10]

Utilizing the guides for construing Section 3 (f
thus established by the courts, the Administrator
the Fair Labor Standards Act has issued several in
terpretative pronouncements which bear directly o
the question of whether packing shed employees, lik
those involved here, fall within the agricultural ex
emption of that section. We turn to the Admini
trator's interpretation as an authoritative source
assistance, for "while not controlling upon the cour
* * * [they] constitute a body of experience an

[10] The Company's attempt to gloss over the distinction betwe
agricultural operations and industrial operations on agricultur
products is highlighted by its reliance on *N. L. R. B.* v. *Campbe*
159 F. 2d 184 (C. A. 5) (Br. pp. 11–12). For in that case th
Court of Appeals for the Fifth Circuit assumed that the trea
ment of agricultural and industrial operations by the Social S
curity Act was "applicable in cases arising under the Nation
Labor Relations Act" (159 F. 2d at 187), and therefore held th
employees were exempt under Section 2 (3) of the National Lab
Relations Act so long as they worked on agricultural commoditi
grown by their employer. But as this Court has recognized,
rejecting the contention that the agricultural exemption in th
Social Security Act is similar to that of Section 2 (3) of th
National Labor Relations Act, "the purpose of [the Social S
curity Act is] very different from the purposes of the so-calle
Wagner Act" and for that reason "we must make a sharp cleava
in the basis of our reasoning." *Idaho Potato Growers*
N. L. R. B., *supra*, at p. 301. Moreover, as we show *infr*
pp. 23-27, the exemption contained in the Board's appropriatio
bill which is applicable here was enacted with the express legisl
tive understanding that its meaning was markedly different fro
that contained in the Social Security Act. Accordingly, th
Campbell case is of no help to the Company either with respe
to Section 2 (3) of the Act or the agricultural rider in the Board
appropriation bill.

informed judgment to which courts and litigants may properly resort for guidance."[11] The "guidance" to be had from the Administrator's ruling is of special importance in this case, for the Company apparently concedes (Br. p. 20) that under them its claim of agricultural exemption is defeated.

Indeed, the Company could scarcely argue otherwise. In his *Interpretative Bulletin No. 14* (Wage and Hour Manual, 1944–1945, p. 560 at 563), the Administrator makes clear that in his opinion a farmer's activities come within the exemption only if they "constitute a subordinate and established part of the farming operation," which is determined by such factors as whether "most of the employees engaged in such practices are normally employed also in farming operations upon the farm, and [whether] these practices occupy only a minor portion of the time of the farmer and such employees and do not constitute the farmer's principal business." Applications of these views to packing shed employees were described in three published letters from the Administrator's office answering two inquiries from the National Labor Relations Board and one from Senator Hayden. Thus, in one of the letters (Vol. 25, Wages and Hours Labor Relations Reporter No. 3, p. 4 (Nov. 14, 1949)), "a fresh fruit packing house" operated by a farmer was determined not to be within the Section 3 (f) exemption because its operations were "characteristic of a nonfarming enterprise," were "not performed on the

[11] See also, e. g., *United States* v. *American Trucking Assn.*, 310 U. S. 534, 549; *Anderson* v. *Manhattan Lighterage Corp.*, 148 F. 2d 971, 973 (C. A. 2); *Miller Hatcheries* v. *Boyer*, 131 F. 2d 283, 286 (C. A. 8).

Kidmore v. Swift & Co., 323 U.S. 134, 140.

farm but in a town approximately four miles distant' and had the "character of a separate business." In another of the letters, the Administrator ruled that "the operations, by the owner of a farm or farms, of a large packing or processing plant of a type operated by nonfarmers and having predominantly industrial characteristics has not, as a rule, been considered a practice 'incident to or in conjunction with' the owners' farming operations" (*ibid.,* p. 9). As summarized by the Administrator (*ibid*, p. 7):

> * * * it is * * * clear from the legislative history of the Fair Labor Standards Act and the reason for the agricultural exemption based upon the definition of agriculture that it was not intended that activities which had assumed an industrial character should be included within the definition merely because the produce being processed came only from the farm of the employer. * * * The determination must ultimately rest upon whether the complete factual picture indicates that the practice is merely a subordinate and established part of the farming operations. * * * Factors to be considered include, among others, the size of the ordinary farming operations, the investment in the enterprise as compared to that in the farm operations, the amount of time spent by the farmer and his employees in each of the activities, the extent to which the operations in question are performed by ordinary farm employees, the degree of industrialization involved, the degree of separation established by the employer between the two types of business operations, and the type of product resulting from the operation of the enterprise.

An examination of the comparative methods by which the Company has organized and operates its farm where the melons are grown and its packing shed where they are sorted and crated for market makes clear, in the light of the principles we have discussed, that its packing shed operations do not fall within the agricultural exemption of Section 3 (f) of the Fair Labor Standards Act. The packing shed, which is located from six to nine miles away from the farm (R. 73), is conducted as a completely separate and independent enterprise from the farm. The majority of the farm work with respect to melons is apparently done by workmen hired by an independent contractor who have nothing to do with the packing shed (R. 76–77, 79, 110). Similarly, the packing shed is run under the supervision of a foreman who has the sole authority to hire and fire its employees, but substantially no authority with respect to the farm's operations (R. 79–81). There is no appreciable interchange of workmen between the farm and the packing shed; indeed, there scarcely could be in view of the fact that the three- or four-month period when the packing shed is in operation is also the busiest season on the farm (R. 76, 110). The farm employees are paid hourly, unlike the packing-shed employees who are paid at a piece rate, and also unlike the latter, the farmers are furnished living quarters, gas, electricity and water (Tr. 70, 72).[12]

[12] The testimony relevant to these facts is as follows:

P. 70—

Q. (by Mr. Magor, for the Board). How are the packing shed employees paid?

Apart from their common ownership, the organization and operation of the packing shed is wholly "separate and distinct" from the farm, thus failing to come within the reach of agriculture as defined in Section 3 (f). *Calaf* v. *Gonzales,* 127 F. 2d 934, 938 (C. A. 1); *Waialua Agriculture Co.* v. *Maneja,* 97 F. Supp. 198, 223 (Hawaii).

Of equal significance with the independent status of the packing shed, in determining whether the Company's employees are agricultural workers within the exemption in Section 3 (f), is the industrial character of its organization. The shed is a building of 60′ x 200′, worth about $25,000, and is located in the City of Mendota on a railway spur which respondent had built for its use at a cost of approximately $3,000 (R. 75, 84). Its operations are completely powered by electricity, the electrical equipment consisting of "conveyors, belting, rollers, bidding machines, crate racks, bins [and] elevators" (R. 84). The melons are brought to the shed from the farm by trucks and trailers rented by respondent from an independent trucking firm (R. 81–82). Upon arrival at the shed

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A. (Mr. Warkentine, for the Company). They are paid per pieces.

Q. What is the rate of pay?

A. The rate of pay—well, that is figured on the packer's output.

P. 72—

Q. As to the ranch employees, how much do they pay people in this work on the ranches?

A. They are paid by the hour.

Q. Paid by the hour. What is their rate of pay?

A. Their rate of pay is 75 cents an hour, which consists of naturally, their living quarters, gas, electricity, gas and water furnished.

the melons are rolled "onto a conveyor belt which conveys them into the shed to the sorters; from the sorters it goes to the packers, and from the packers to the bidding machine and down the conveyor there, and the bidders and truckers pick it up and load." (R. 82). The Company contracts with a local ice company to service refrigerator railway cars, where the melons are loaded, at a cost of approximately $10,000 a year (see Company Br., p. 2). During the peak of the packing season about 60 employees work at the shed (R. 21). The terms and conditions of employment for these employees are established in a collective bargaining agreement, which of course in no way affects respondent's farm employees (R. 111). At the end of the season all of the packing shed employees are laid off and the shed is closed down (Tr. 69).[13]

In these circumstances we think it plain that the packing shed employees "are typical factory workers or laborers engaged in maintaining industrial facilities." *Bowie* v. *Gonzalez,* 117 F. 2d 11, 18. (C. A. 1.) They have no association with the farm work as such, and are treated by the Company as industrial workers (see, Collective Bargaining Contract, Board Ex. #3, R. 111). In short, an application here of the criteria by which nonagricultural workers are

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[13] The supporting testimony for this statement is as follows: P. 69—

Q. (by Mr. Magor for the Board). Now when the packing shed closes down to all of those employees? They cease working?

A. (by Mr. Warkentine for the Company). That is true.

Q. The people working on the packing shed?

A. Yes.

measured (pp. 18-19, *supra*), *viz,* the Company's substantial investment in the packing shed, the lack of interchange of employees between farm and packing shed, the full time and industrial character of the work at the packing shed, and the complete organizational and geographical separation between the farm and packing shed, shows unmistakably that the packing shed is not a farming operation so as to exempt its employees under Section 3 (f) of the Fair Labor Standards Act.

B. In its consideration of the agricultural rider to the Board's appropriation bill Congress expressed an unambiguous intent not to exempt packing shed employees from the protection of the Act

The correctness of construing Section 3 (f) of the Fair Labor Standards Act, as incorporated into the agricultural rider which the Company invokes in this case, not to exempt the Company's packing shed employees is conclusively confirmed by the legislative debates on the appropriation rider. This legislative history shows that the language of the rider as it first appeared in 1946 in the proposed appropriation bill for the Board was designed to exempt packing shed employees, like those of the Company, ~~or~~ as agricultural laborers. However, this language was deleted, and the present language was substituted, for the express reason that Congress did not wish to deprive such packing shed employees of the Act's benefits. It was only upon the explicit assurance by the managers of the appropriation bill that packing shed employees would not be within the agricultural exemption that the Senate enacted the rider

We describe this persuasive legislative history in more detail below.

As the Board's appropriation bill for the fiscal year 1946–1947 was initially introduced into the House, it contained no limitation with respect to agricultural workers.[14] However, during the House consideration of the bill Representative Elliott proposed an amendment subsequently adopted by the House (92 Cong. Rec. 6692), which reads as follows (92 Cong. Rec. 6689):

> *Provided further,* that no part of the funds appropriated in this title shall be used in connection with the investigation, hearings, directives, or orders concerning bargaining units composed in whole or in part of agricultural laborers as that term is defined in the Social Security Act in section 409, title 42, United States Code.

The definition in the Social Security Act thus referred to would have extended the agricultural exemption to "* * * all services performed * * * (4) In handling * * * packing, packaging, [or] processing * * * any agricultural or horticultural commodity * * * if such service is performed * * * in the case of fruits and vegetables, as an incident to the preparation of such fruits and vegetables for market."[15] As Representative Elliott conceded (92 Cong. Rec. 6691, 9147), and as was assumed throughout the debate in the House (92 Cong. Rec. 6689, 6690, 6691, 8664), the Elliott proposal would

[14] H. R. 6739, 79th Cong., 2d sess., pp. 44–46 (1946).

[15] 42 U. S. C. 409 (h), 410 (f); see also 92 Cong. Rec. 6689.

have exempted from the Act's protection, as agricultural workers, those who were employed in packing sheds like the one involved in this case.

When the House bill was submitted to the Senate, and there referred to the Senate Appropriations Committee, Chairman Herzog of the National Labor Relations Board, protested the adoption of the Elliott agricultural rider in his testimony during the Senate Committee hearings. According to Chairman Herzog the Elliott rider would exempt "packing shed and processing employees * * * mostly in the western part of the United States, and some in the South, who are really industrial workers."[16] The Senate Appropriations Committee apparently agreed, and in its report to the Senate recommended that the Elliott rider be deleted from the bill.[17] Although the Senate adopted the recommended deletion (92 Cong. Rec. 7945), the House refused to accept the Senate action, and conferees from the two bodies were unable to reach an agreement. 92 Cong. Rec. 8657, 8658, 8662–8668.

At this juncture Senator McCarran, chairman of the Senate Appropriations Committee, proposed on the floor of the Senate that the Senate recede from its position, and agree to the Elliott rider which exempted "employees who work in packing houses, that is crating houses and sheds where agricultural commodities are first packed for shipment" (92 Cong. Rec. 8735). The Senate was adamant, however, and

[16] Hearings before the Subcommittee of the Committee on Appropriations, United States Senate on H. R. 6739 (1946), p. 101.

[17] Sen. Rep. 1619, 79th Cong., 2d sess., p. 12 (1946).

voted to reject the Elliott rider by a count of 53–23. 92 Cong. Rec. 8746. The reasons advanced by the Senators opposing the Elliott rider were in large measure those which this Court in the *North Whittier Heights* case[18] and the Administrator of the Fair Labor Standards Act have expressed in refusing to classify packing shed employees as agricultural workers. See pp. 16-19, *supra,* and 92 Cong. Rec. 8735–8746.

Finally, the impasse between the House and the Senate was broken by the substitution by the conferees of the present language, incorporating the definition of agricultural laborer found in Section 3 (f) of the Fair Labor Standards Act for the Elliott rider which referred to the definition in the Social Security Act. The conference agreement was passed without debate in the House (92 Cong. Rec. 9494), but was accepted by the Senate (92 Cong. Rec. 9642) only after assurance had been given by Senator McCarran, as chairman of the Appropriations Committee and one of the conferees, that Section 3 (f) would not exempt employees of "a packing shed * * * operated away from the farm and carried on not as a farming operation, but as an independent enterprise." 92 Cong. Rec. 9642. As further explained by Senator Ball, another of the conferees (92 Cong. Rec. 9642):

> Instead of using the definition of "agricultural worker" contained in the Social Security Act [sic] the definition is a very broad one, covering, as the Senator knows, a great many processing employees, packing shed workers,

[18] 109 F. 2d 76 at 79–81, cited in 92 Cong. Rec. 8737 and 8742.

> and so forth—this change substitutes the definition of "agriculture" contained in the Fair Labor Standards Act, which is a much narrower definition.

And, significantly, both Senators McCarran and Ball informed the Senate that the substitution had been discussed with representatives of the National Labor Relations Board, who were satisfied that Chairman Herzog's objections to the Elliott rider (p. 25, *supra*) were no longer applicable (92 Cong. Rec. 9641–9642).

From the foregoing it seems clear that the Company is asking this Court to adopt a construction of the agricultural exemption in the Board's appropriation bill which Congress expressly considered and rejected. We think it would be difficult to find a more striking example of a manifestation of legislative intent with respect to a particular factual situation than that involved here, where Congress refused to enact a proposed definition of agricultural laborers until it was assured that packing shed employees, like the Company's, were not encompassed by the definition. And, we submit, this expression of intent is wholly consistent with the language Congress adopted, which, as we have shown, cannot properly be stretched to include within its exempting provisions employees like those involved here.

CONCLUSION

For the foregoing reasons we respectfully submit that the Company's contention that its employees are agricultural workers and therefore exempted from

the Act's protection should be rejected, and that the Board's order should be enforced in full.

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